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Recent Developments in Capital Punishment

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Recent Developments in Capital Punishment

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Introduction

The U.S. Supreme Court is presently considering three main issues affecting capital punishment:

1. Challenges to the method of execution, specifically the use of midazolam in three-drug lethal injection protocols (*Glossip v. Gross*)
2. Determining eligibility for execution, specifically whether an inmate is intellectually disabled under *Atkins v. Virginia* (*Brumfield v. Cain*)
3. Procedures for imposing the death penalty, specifically a judge's ability to override a jury's sentencing recommendation (*Hurst v. Florida*, *Scott v. Alabama*, *Lockhart v. Alabama*)

I. Methods of execution (*Glossip v. Gross*)

A. At issue in *Glossip* is Oklahoma's three-drug protocol.

The protocol calls for sequential injection of:

- Sedative (midazolam)
- Paralytic (vecuronium or rurocuronium bromide)
- Heart-stopping drug (potassium chloride)

Florida and Alabama use an identical drug protocol. Like all states using lethal injection, the states have procedural safeguards to ensure proper administration of the drugs.

B. Context

The majority of states, as well as the federal government, include capital punishment among available sentences for heinous murders.[1]

Methods include electrocution, hanging, lethal gas, firing squad, and lethal injection.

[1] Ala. Code §§ 13A-5-39(1), 13A-5-40; Ariz. Rev. Stat. Ann. § 13-751; Ark. Code Ann. § 5-4-615; Cal. Penal Code §§ 190, 190.2; Colo. Rev. Stat. § 18-1.3-1201; Conn. Gen. Stat. § 53a-46a; Del. Code Ann. tit. 11, § 4209; Fla. Stat. Ann. § 921.141; Ga. Code Ann. § 16-5-1; Idaho Code Ann. § 19-2515; Ind. Code. § 35-50-2-3; Kan. Stat. Ann. § 21-6617; Ky. Rev. Stat. Ann. § 532.030; La. Code Crim. Proc. Ann. art. 905; Miss. Code Ann. § 97-3-21(3); Mo. Rev. Stat. § 565.020; Mont. Code Ann. §45-5-102; Neb. Rev. Stat. §§ 28-303, 29-2519–2524; Nev. Rev. Stat. § 200.030; N.H. Rev. Stat. § 630:1; N.C. Gen. Stat. Ann. § 15A-2000; Ohio Rev. Code Ann. § 2929.04; Okla. Stat. Ann. tit. 21, § 701.9; Or. Rev. Stat. § 163.105; 18 Pa. Const. Stat. Ann. § 1102(a)(1); S.C. Code Ann. § 16-3-20; S.D. Codified Laws § 23A-27A-4; Tenn. Code Ann. § 39-13-204; Tex. Penal Code Ann. § 12.31; Utah Code Ann. § 76-3-206; Va. Code Ann. § 18.2-10(a); Wash. Rev. Code Ann. § 10.95.030; Wyo. Stat. Ann. § 6-2-101. *See also* Vt. Stat. Ann. tit. 13, § 3401 (making treason punishable by death).

Essentially all states have lethal injection as their primary execution method. Historically, states used pentobarbital or sodium thiopental as the sedative in their drug protocols.

But these factors have worked to make these drugs unavailable:

- Abolitionist lobby
- European Union's export restrictions
- Pharmaceutical companies
- Litigation

As other drugs became unavailable, states turned to compounding pharmacies or other drugs like midazolam.

C. Legal landscape

The Supreme Court has never invalidated a state's chosen method of execution.

In *Nelson v. Campbell* (2004) and *Hill v. McDonough* (2006), the Supreme Court held that inmates can challenge execution methods under 42 U.S.C. § 1983.

In *Baze v. Rees* (2008), an inmate challenged the three-drug protocol using pentobarbital as the sedative. The plurality's standard in *Baze* requires inmates to show:

1. The challenged method creates a substantial risk of serious harm, and

2. A feasible, readily implemented alternative significantly reduces the risk of pain

Five justices agreed the method was constitutional.

D. *Glossip v. Gross*

Inmates challenged the use of midazolam, disputing the district court's factual findings that it effectively caused unconsciousness. They also argued they should not have to plead an alternative.

Oklahoma responded that midazolam is effective and that inmates must plead an alternative; otherwise, the § 1983 suit becomes effectively a challenge to execution itself.

E. Effects on Alabama

Alabama's protocol includes midazolam, so an invalidation of Oklahoma's drug protocol could prevent Alabama from using midazolam in executions.

A decision could resolve the problem of endless litigation, especially if the Supreme Court reinforces the *Baze* plurality standard by requiring all inmates challenging execution methods to plead an effective, available alternative execution method.

Alabama's legislature is considering bills (a) to make electrocution an alternative if lethal injection drugs are unavailable and (b) to protect from disclosure the name and involvement of drug providers.

By the numbers:

- 18 inmates have exhausted their appeals.
- The state has sought execution dates from the Alabama Supreme Court for 9 inmates.
- The Alabama Supreme Court has set execution dates for two inmates, and the executions are stayed pending the outcome of *Glossip*.

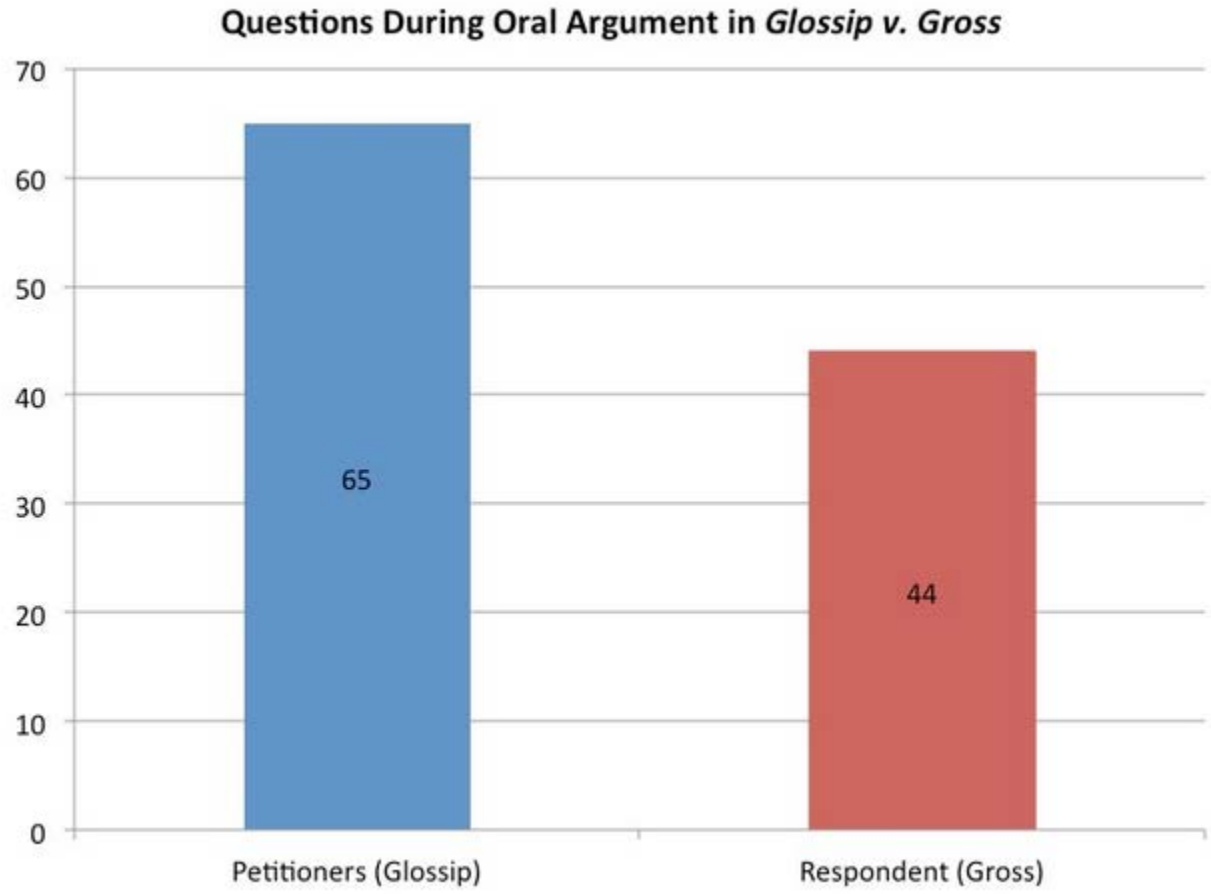
F. Reading the tea leaves

The justices recognized the problems states face in carrying out capital punishment. As Justice Alito said:

> I mean, let's be honest about what's going on here. Executions could be carried out painlessly. There are many jurisdictions—there are jurisdictions in this country, there are jurisdictions abroad that allow assisted suicide, and I assume that those are carried out with little, if any, pain. Oklahoma and other States could carry out executions painlessly.
>
> Now, this Court has held that the death penalty is constitutional. It's controversial as a constitutional matter. It certainly is controversial as a policy matter. Those who oppose the death penalty are free to try to persuade legislatures to abolish the death penalty. Some of those efforts have been successful. They're free to ask this Court to overrule the death penalty.
>
> But until that occurs, is it appropriate for the judiciary to countenance what amounts to a guerilla war against the death penalty which consists of efforts to make it impossible for the states to obtain drugs that could be used to carry out capital punishment with little, if any, pain? And so the States are reduced to using drugs like this one which give rise to disputes about whether, in fact, every possibility of pain is eliminated.

A 5-4 affirmance seems likely. The Court could reinforce the *Baze* plurality standard, requiring inmates to plead alternative execution methods that are effective, available, and acceptable to the inmates.

iSCOTUSnow predicts a win for the respondent.



http://blogs.kentlaw.iit.edu/iscotus/predicting-winners-glossip-v-gross-mata-v-holder/

II. Eligibility for execution (*Brumfield v. Cain*)

A. Context

In *Atkins v. Virginia* (2002), the Supreme Court held that intellectually disabled persons may not be executed. The Court left the development of procedural and substantive guidelines to the states.

A person is intellectually disabled if:

1. They have significantly subaverage intellectual functioning (typically, an IQ of 70 or below)
2. They have significant deficits in adaptive functioning
3. 1 and 2 were present before age 18

In *Hall v. Florida* (2014), the Supreme Court held that states may not impose a strict IQ cutoff of 70. The Court discussed the standard error of measure (SEM), which is usually +/- 5 points, and the Flynn effect, the rise of overall IQ test scores over time. These factors mean that an IQ score alone cannot determine a person's mental status.

B. How intellectual disability is diagnosed

1. Psychologist interviews inmate, family, friends, teachers
2. Psychologist conducts testing, including Wechsler IQ tests and similar intelligence tests
3. Psychologist considers diagnostic criteria, evaluates intellectual and adaptive functioning, and makes a diagnosis

C. Present Problems

Some inmates were sentenced to death before *Atkins* and began litigating their mental status afterwards. This presents the question whether pre-*Atkins* evidence of mental status, often presented at the penalty phase, can be used to determine intellectual disability under *Atkins*.

D. *Brumfield v. Cain*

State proceedings:

- The inmate murdered a police officer and received a death sentence.
- During Louisiana post-conviction proceedings, the inmate claimed ineligibility for the death penalty because of his mental status. After the Supreme Court decided *Atkins*, he amended his petition to include an *Atkins* claim.
- The state court used the penalty-phase record to deny his *Atkins* claim without an evidentiary hearing.

Federal proceedings:

- The federal district court granted an evidentiary hearing, where it heard evidence from experts who diagnosed Brumfield with intellectual disability. The federal district court granted habeas relief
- The Fifth Circuit faulted the district court for failing to defer to the state court's reasonable determinations under the Antiterrorism and Effective Death Penalty Act (AEDPA) and reversed. The appellate court also noted that no federal law requires funding for *Atkins* experts.

In the Supreme Court:

- The inmate argued that the state courts unreasonably determined that he was not intellectually disabled and that they should have given him an evidentiary hearing on the question. At oral argument, he made clear that he does not seek a bright-line rule about the use of pre-*Atkins* evidence to determine mental status for *Atkins* claims.
- Louisiana argued that, under AEDPA, the state courts reasonably concluded Brumfield was not intellectually disabled. Review should be limited to the record before the state court, and no federal law or constitutional right guarantees inmates funding or experts to make *Atkins* claims.
- At oral argument, the inmate's counsel made clear he sought relief specific to this case, not a bright-line rule. Justice Alito noted he made "purely a factual argument about this case." Several justices said—and Brumfield agreed—that his argument would require a thorough record-review of factual determinations, an idea Justice Scalia called "fantastical."

E. Alabama effects:

Smith v. Campbell, a pending case in the 11th Circuit, presents similar questions about state courts using penalty-phase evidence to evaluate *Atkins* claims. At oral argument, the panel indicated it would hold its decision for *Brumfield*.

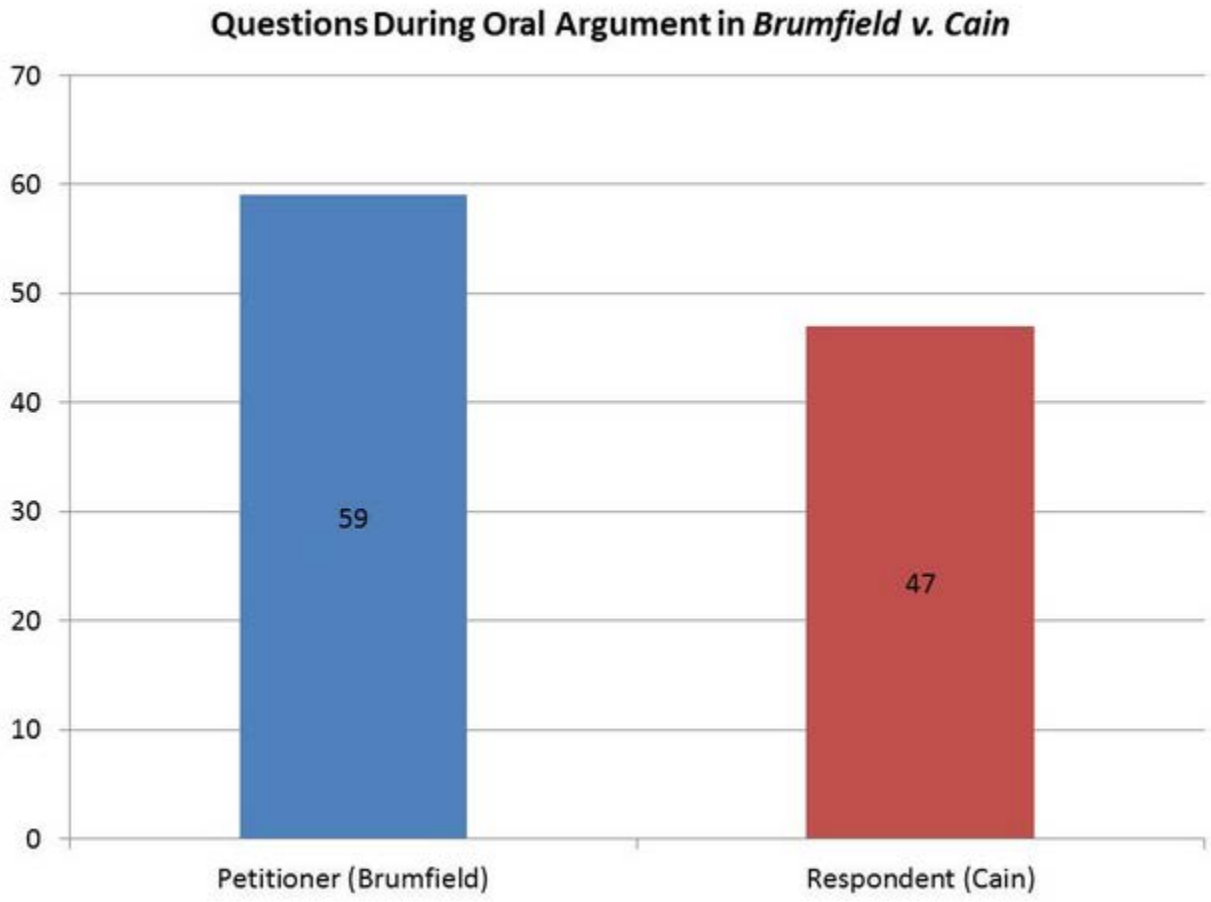
Any rule in *Brumfield* would likely have limited application, practically applying only in cases where an inmate has not come forward with actual evidence showing intellectual disability. Typically, an inmate supports a post-conviction *Atkins* claim with an affidavit from a psychologist, or even from his trial psychologist, diagnosing him with intellectual disability. Alabama routinely concedes in such cases that an evidentiary hearing to determine the inmate's mental status is appropriate.

F. Reading the tea leaves

The Court is likely to reach a limited, fact-bound decision in *Brumfield*. It may create a broader rule about using pre-*Atkins* evidence to determine intellectual disability.

This case presents an unusual concern because a federal court has determined that Brumfield is ineligible for the death penalty because he is intellectually disabled.

iSCOTUSnow predicts a win for the state respondent.



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III. Procedures for imposing the death penalty (*Hurst v. Florida*, *Scott v. Alabama*, and *Lockhart v. Alabama*)

A. Overview

Hurst, *Scott*, and *Lockhart* concern the roles of judge and jury in imposing a capital sentence.

Florida, Alabama, and Delaware permit judges to override a jury's recommendation of life without parole and sentence a defendant to death.

B. Legal landscape

In *Walton v. Arizona* (1990), the Supreme Court held that a judge could find additional facts that made a defendant eligible for a capital sentence because those facts were sentencing considerations, not elements of capital murder.

But in *Apprendi v. New Jersey* (2000), the Supreme Court held that a judge cannot impose a sentence greater than the maximum supported by facts the jury found.

Then, in *Ring v. Arizona* (2002), the Supreme Court overruled *Watson*, relying on *Apprendi*. It held that a judge cannot find an aggravating circumstance necessary for the imposition of the death penalty.

C. Hybrid sentencing schemes

SCOTUS has not invalidated hybrid systems where the jury recommends a sentence and a judge makes the final determination after a jury recommendation. Only three states permit judges to override a jury's sentencing recommendation.

- Ala. Code §§ 13A-5-46 & 13A-5-47
- Fla. Stat. Ann. § 921.141
- Del. Code Ann. Title 11, § 4209

D. Alabama's procedure

After a defendant is convicted of capital murder, the penalty phase begins. The jury must determine and weigh aggravating and mitigating circumstances to reach its recommendation. At least 10 jurors must agree to recommend death, and at least 7 must agree to recommend life without parole. The judge may override the jury's recommendation.

E. *Scott v. Alabama* and *Lockhart v. Alabama*

Inmates challenged Alabama's judicial override system as arbitrary and capricious. The Supreme Court has already upheld Alabama's system against challenge in *Harris v. Alabama* (1995), and it denied certiorari in these cases last month.

F. *Hurst v. Florida*

Inmates have challenged Florida's scheme under *Ring*. In Florida, unlike any other state, the jury need not find aggravating factors unanimously.

Merits briefs in this case are due over the summer, and the case will be argued and decided next term.

If the Supreme Court focuses on the jury's determination of aggravating factors, the decision likely will not affect Alabama. The decision could have broader implications if the Supreme Court considers the judge's ability to override the jury's sentencing recommendation.

G. Reading the tea leaves

The Supreme Court denied certiorari in *Scott* and *Lockhart*, instead of holding them for its decision in *Hurst*. It also restated a limited question presented in *Hurst*, asking only "Whether Florida's death sentencing scheme violates the Sixth Amendment or the Eighth Amendment in light of this Court's decision in *Ring v. Arizona*."

The Supreme Court seems likely to evaluate Florida's sentencing scheme without considering or invalidating judicial override as a whole.

Appendix: Case citations

I. Methods of execution

***Glossip v. Gross* (U.S. Supreme Court No. 14-7955)**

Nelson v. Campbell, 541 U.S. 637 (2004)

Hill v. McDonough, 547 U.S. 573 (2006)

Baze v. Rees, 553 U.S. 35 (2008)

II. Determining eligibility for execution

***Brumfield v. Cain* (U.S. Supreme Court No. 13-1433)**

Atkins v. Virginia, 536 U.S. 304 (2002)

Hall v. Florida, 134 S. Ct. 1986 (2014)

Smith v. Campbell (11th Cir. 14-10721)

III. Procedures for imposing the death penalty

***Hurst v. Florida* (U.S. Supreme Court No. 14-7505)/*Scott v. Alabama* (U.S. Supreme Court No. 14-8189)/*Lockhart v. Alabama* (U.S. Supreme Court No. 14-8194)**

Walton v. Arizona, 497 U.S. 639 (1990)

Apprendi v. New Jersey, 133 S. Ct. 2151 (2013)

Ring v. Arizona, 536 U.S. 584 (2002)

Harris v. Alabama, 513 U.S. 504 (1995)

Ala. Code §§ 13A-5-46 & 13A-5-47

Fla. Stat. Ann. § 921.141

Del. Code Ann. Title 11, § 4209